

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits for his accepted lumbar spine and emotional conditions, effective May 22, 2020; (2) whether appellant has met his burden of proof to establish continuing employment-related disability or residuals on or after May 22, 2020 causally related to the July 1, 2006 employment injury; and (3) whether OWCP properly determined that appellant abandoned his request for an oral hearing.

FACTUAL HISTORY

On July 3, 2006 appellant, then a 51-year-old mail handler, filed a claim for occupational disease (Form CA-2) alleging that he sustained lumbar strain causally related to factors of his federal employment including placing objects on a belt. OWCP initially accepted the claim for right lumbar sprain and later expanded the acceptance of his claim to include thoracic or lumbosacral neuritis or radiculitis, degeneration of lumbar or lumbosacral disc, lumbar spondylosis without myelopathy, and mild recurrent major depression. Appellant worked limited duty until September 2008 when he retired. OWCP paid him wage-loss compensation on the supplemental rolls beginning August 21, 2009 and on the periodic rolls beginning October 24, 2010.

By decision dated February 25, 2009, OWCP granted appellant a schedule award for 19 percent permanent impairment of the bilateral lower extremities. The period of the award ran for 109.44 weeks from July 9, 2007 through August 13, 2009.

On April 10, 2019 OWCP referred appellant to Dr. Laura N. Sciaroni, a Board-certified orthopedic surgeon, along with the case record and a statement of accepted facts (SOAF) for a second opinion evaluation. It requested that she address whether he currently had any continued residuals of his accepted orthopedic conditions. In a report dated June 26, 2019, Dr. Sciaroni examined appellant to determine if he had any continued residuals of his accepted orthopedic conditions. Appellant presented with subjective complaints of pain in his lower back, intermittent pain in his right shoulder, and numbness and pain in his left shoulder. On physical examination Dr. Sciaroni observed that he ambulated with a single point cane without analgesia. With regard to the lumbar spine, she observed standing with normal alignment, tenderness to palpation of the left lumbar paraspinal musculature, and sciatic notch. Dr. Sciaroni noted voluntary guarding with extension to 5 degrees, flexion to 30 degrees, and bending laterally in each direction to 15 degrees, indicating that appellant could not go further due to pain. When asked to remove his shoes, appellant flexed the lumbar spine to at least 60 degrees. He stated to Dr. Sciaroni that he had diminished sensation to light touch in all dermatomes of the left lower extremity. A straight leg raise test was negative. Dr. Sciaroni observed bilaterally symmetric deep tendon reflexes with 4/5 strength on manual motor testing throughout left lower extremity muscle groups. She opined that she did not see evidence that appellant had been totally disabled due to his accepted work-related condition. She further opined that he continued to suffer residuals of his work-related orthopedic injury, based upon subjective complaints. However, with regard to the lumbar spine, while he demonstrated numbness and weakness in a nondermatomal way that did not correlate with lumbar radiculopathy, he had no objective evidence of residuals of his work-related injury. Dr. Sciaroni related that appellant had retired after extensive treatment for his condition, without resolution of the condition. Appellant's prognosis for further recovery was poor, and future medical treatment

should consist of his current medications and exercise program. His condition was permanent and stationary. Dr. Sciaroni stated that appellant was a candidate for vocational rehabilitation and attached a work capacity evaluation for musculoskeletal conditions (Form OWCP-5c) indicating that he was able to return to work with restrictions.

In a letter dated July 16, 2019, OWCP requested that Dr. Richard Fernandez, a treating physician Board-certified in pain medicine, review Dr. Sciaroni's June 26, 2019 report. In a report dated July 26, 2019, Dr. Fernandez diagnosed left subscapularis tendinosis, left L5-S1 facet arthralgia, left sacroiliac arthralgia, lumbar disc injury, and left sciatica. He physically examined appellant, observing moderate tenderness and spasticity over the left L5-S1 level, decreased sensation in a stocking distribution below the knee, 4/5 motor strength with guarding of the lower extremities, a bilateral straight leg raise to 80 degrees with pain more to the left than the right, 50 degrees of forward flexion with slight pain, 25 degrees of extension, bilateral lateral flexion to 45 degrees on the right and 40 degrees on the left with slight pain, and bilateral rotation to 35 degrees. Dr. Fernandez noted that, while appellant's examination included nonorganic signs, he had been consistent upon palpation during his examinations over the past years. He concluded that his examination was reflective of Dr. Sciaroni's examination and opined that appellant was capable of working modified duty.

In a letter dated August 20, 2019, OWCP requested a supplemental opinion from Dr. Fernandez with regard to Dr. Sciaroni's finding that there was no objective evidence of residuals from his work-related orthopedic injury. In a supplemental report dated August 22, 2019, Dr. Fernandez stated that he found Dr. Sciaroni's assessment accurate, as there was limited objective evidence of residual injury that existed at that time and that most of appellant's complaints were subjective. He explained that he had observed nondermatome and myotome distribution of numbness and weakness of appellant's left lower extremity in the past, as well as inconsistent range of motion, yet with consistent points of tenderness.

On November 25, 2019 OWCP referred appellant to Dr. Daniel Sussman, a Board-certified psychiatrist, for a second opinion evaluation. It requested that Dr. Sussman address whether he currently had any continued residuals of his accepted psychiatric employment condition(s). In a report dated December 18, 2019, Dr. Sussman reviewed a SOAF and the case record, and diagnosed moderate chronic major depressive disorder, generalized anxiety disorder, panic disorder, mild alcohol use disorder, nicotine use disorder, avoidant and paranoid personality traits, and noted that mild neurocognitive disorder should be ruled out, stating that it was likely due to history of alcohol use. Appellant's symptom review indicated frequent panic attacks when alone and off-prescription drugs; excessive worry, racing thoughts, and restlessness; irritability, anger, mood swings, and depression; variable sleep; diminished concentration, energy, interests, volition, self-esteem, and hope; and complaints of memory deficits. He stated that he had considered returning to work, but felt that he could not due to discomfort and phobia of getting hurt again. Appellant noted that if someone angered him with his condition he might get into a fight. He stated that he used to be a "happy-go-lucky guy," which was still possible when his prescriptions were working well, but that he would rather lay down and relax. Appellant denied proneness to depressive and anxious symptoms prior to the work-related injury. Dr. Sussman noted remarkable findings of examination including mildly pressuring and loud speech at times; an anxious, mildly irritable, mildly labile and intense mood that became more relaxed after comfort with the interview; initial tenseness and feeling compelled to advocate his claim; mild paranoia; and

rambling at times. With regard to appellant's total disability due to a work-related condition, Dr. Sussman noted that in the context of past psychological batteries that noted embellishment and exaggeration, he could not opine an endorsement of appellant's subjective sense of nearly-totally debilitating psychiatric disability. He observed that appellant's coping and resilience were chronically impaired and opined that vocational rehabilitation should be attempted in possible training for opportunities that necessitated minimal socialization, and that efforts in such programs should be carefully followed for good faith. Dr. Sussman opined that appellant continued to suffer several stigmas of major depressive disorder and that it was a "very mixed picture" regarding the degree to which persisting symptoms emanated from the original work-related injury, *versus* being attributable to personal constitutional propensities such as limited coping, resilience, avoidant personality features, and potential secondary gain and lifestyle habits of alcohol and tobacco use. In an attached Form OWCP-5c, he indicated that appellant was competent to work eight hours per day at his usual job, but also indicated that appellant should be vocationally rehabilitated for a nonphysical position.

In a letter dated January 14, 2020, OWCP enclosed the December 18, 2019 report from Dr. Sussman for appellant to present to his treating psychiatrist for review. No reply from appellant's treating psychiatrist was received.

On April 7, 2020 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, as the evidence of record established that he no longer had employment-related residuals or disability due to his work-related conditions. It advised him that the proposed termination of benefits was based on the reports of Dr. Sciaroni and Dr. Sussman, noting that appellant's treating physician, Dr. Fernandez, concurred with Dr. Sciaroni's opinion. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination of benefits.

By decision dated May 22, 2020, OWCP terminated appellant's wage-loss compensation and medical benefits effective that same date. It found that the weight of the medical evidence of record established that appellant no longer had any residuals related to his accepted work-related medical conditions or continued disability from work as a result of the July 1, 2006 employment injury.

On May 27, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By notice dated August 6, 2020, OWCP informed appellant that a telephonic hearing would be held on September 9, 2020 at 3:15 p.m. Eastern Standard Time. It sent this notice to appellant's address of record. Appellant did not appear for the oral hearing.

In a decision dated September 22, 2020, OWCP found that appellant had abandoned his request for a hearing. It noted that he received written notice of the hearing 30 days in advance, but failed to appear. Further, OWCP noted no indication that appellant made any contact before or after the hearing to explain his failure to appear. Under those circumstances, it determined, he abandoned his request.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 22, 2020, as he no longer had disability or residuals casually related to his accepted July 1, 2006 employment injury.

In a June 26, 2019 report, Dr. Sciaroni, a second opinion physician, related that appellant had no objective orthopedic findings referable to the July 1, 2006 employment injury. She noted with regard to the lumbar spine, while he demonstrated numbness and weakness in a nondermatomal way that, did not correlate with lumbar radiculopathy, he had no objective evidence of residuals of his work-related injury. Dr. Sciaroni opined that she did not see evidence that appellant had been totally disabled due to his accepted work-related condition. She stated that he was a candidate for vocational rehabilitation and attached a Form OWCP-5c indicating that he was able to return to work with restrictions. Dr. Sciaroni concluded that appellant's prognosis for recovery was poor, his condition was permanent and stationary, and that he should continue with his current medications. Appellant's treating physician, in reports dated July 26 and August 22, 2019, stated that he found Dr. Sciaroni's report accurate, noting that there was limited objective

³ *D.B.*, Docket No. 19-0663 (issued August 27, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *A.R.*, Docket No. 20-0335 (issued August 7, 2020); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *V.S.*, Docket No. 19-1792 (issued August 4, 2020); *K.W.*, Docket No. 19-1224 (issued November 15, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁷ *K.W.*, *supra* note 5; *see A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake, id.*

evidence of residual injury that existed at that time and that most of appellant's complaints were subjective. He also related that appellant could perform work with restrictions.

The Board finds that the medical evidence of record fails to establish that appellant no longer has residuals of the accepted conditions and that he no longer requires medical treatment. Dr. Sciaroni did not specifically address each of his accepted orthopedic conditions. Furthermore, her opinion is contradictory as to whether appellant had residuals and disability due to of his accepted conditions, as she indicated that he had no objective findings, but she also noted that his prognosis for recovery was poor, he had continued subjective complaints which were permanent and stationary, he required continued medical treatment, and he required work restrictions.⁸ OWCP was required to seek clarification as to whether he had residuals and disability due to each of the accepted orthopedic conditions. As it undertook development of the evidence by referring appellant to Dr. Sciaroni, it had the duty to secure an appropriate report which addressed all of the accepted conditions and was internally consistent.⁹

The Board further finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits related to the accepted major depressive disorder, effective May 22, 2020, based on the opinion of Dr. Sussman, OWCP's second opinion physician.

In a report dated December 18, 2019, Dr. Sussman stated that he could not provide an endorsement of appellant's subjective sense of nearly-totally debilitating psychiatric disability. However, he observed that appellant's coping and resilience were chronically impaired and opined that vocational rehabilitation should be attempted in possible training for opportunities that necessitated minimal socialization, and that efforts in such programs should be carefully followed for good faith. Dr. Sussman opined that appellant continued to suffer several stigmata of major depressive disorder and that it was a "very mixed picture" regarding the degree to which persisting symptoms emanated from the original work-related injury. In an attached Form OWCP-5c, he indicated that appellant was competent to work eight hours per day at his usual job, but also indicated that appellant should be vocationally rehabilitated for a nonphysical position.

The Board finds that Dr. Sussman's December 18, 2019 report was unclear and insufficiently rationalized to meet OWCP's burden of proof to terminate appellant's medical benefits with regard to appellant's accepted major depressive disorder. Instead, he opined that appellant continued to suffer symptoms of major depressive disorder and that it was uncertain regarding the degree to which these persisting symptoms were related to the original work in jury. The Board has previously indicated that OWCP shares responsibility in the development of the evidence.¹⁰ Accordingly, once OWCP undertakes to develop the medical evidence further, it has

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *V.W.*, Docket No. 19-1537 (issued May 13, 2020); *N.C.*, Docket No. 19-1191 (issued December 19, 2019); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

⁹ *Id.*

¹⁰ See *D.V.*, Docket No. 17-1590 (issued December 12, 2018); *Russell F. Polhemus*, 32 ECAB 1066 (1981).

the responsibility to do so in the proper manner.¹¹ OWCP did not secure a supplemental report from Dr. Sussman to address the inconsistency in his report regarding whether appellant's continued symptoms of major depression were related to his accepted July 1, 2006 work injury. The Board finds that the further development of the medical evidence commenced by OWCP was also necessary to clarify Dr. Sussman's December 18, 2019 report.¹² As OWCP failed to further develop the claim, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 22, 2020.¹³

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 22, 2020.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2020 decision of the Office of Workers' Compensation Programs is reversed. The September 22, 2020 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: January 25, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹¹ See *G.T.*, Docket No. 18-1302 (issued October 22, 2019); *A.K.*, Docket No. 18-0462 (issued June 19, 2018); *Robert F. Hart*, 36 ECAB 186 (1984).

¹² See *D.P.*, Docket No. 20-0747 (issued June 2, 2020); *G.T.*, *id.*

¹³ Given the Board's disposition of Issue 1, Issues 2 and 3 are moot. See *G.T.*, *supra* note 11.